IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 35

UNITED STATES OF AMERICA, APPELLANT

vs.

GERALD H. SHARPNACK

On Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

Brief for Appellee

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PRELIMINARY STATEMENT

We accept Appellant's "Statement" and other preliminaries, including Appellant's definition of the "Question Presented."

However, for purposes of convenient introduction to our argument, we here summarize the basis for issue.

The indictment in this case was based upon the alleged commission on a federal enclave of acts which would constitute violation of sections 535(b) and 535(c) of the Texas Penal Code, which sections were enacted in 1950. The indictment's operation depended upon the Federal Assimilative Crimes Act of 1948 (18 U.S.C. § 13) which purports to punish federally acts committed on a federal enclave which

would be punishable by the "laws [of the appropriate states] . . . in force at the time of such act[s] . . ."

The Federal District Court dismissed the indictment on the grounds that Congress could not constitutionally adopt prospectively state criminal laws for its federal enclaves.

That is the question.

SUMMARY OF ARGUMENT

I.

As an exclusively legislative function of Congress, this attempted delegation of the power to create federal criminal law is unconstitutional.

Constitutional limitations inhibit the admitted rght of Congress to share its functions. For example, Congress' inherent legislative functions may not be surrendered to another federal agency.

As a converse example of the limitations inherent in our system of dual sovereignty, the states may not delegate their exclusively legislative powers to the federal government.

The defining of federal crimes and the fixing of penalties therefor is clearly a power belonging exclusively to the legislative branch of the federal government.

II.

Beginning with **U.S. vs. Raul,** 31 U.S. 141; 8 L.Ed. 348, 6 Pet. 141, the federal courts and the Congress (until the Federal Assimilative Crimes Act of 1948) considered that the assimilation of state criminal laws to federal enclaves must be limited to state laws in force at the time of the enactment of any federal assimilative crimes act — else such assimilation would be an unconstitutional delegation of Congress' legislative authority.

III.

Valid Congressional action in aid of enforcement of state law, in filling up the details of federal law, in removing obstacles to the operation of state law, or in delegating law-making functions to federal territories, etc. provide no sound constitutional justification for giving the states the authority to enact federal criminal law for federal enclaves.

IV.

Neither possible outmoding of Chief Justice Marshall's alleged "philosophical considerations" in support of his assumed motivation in **U.S. vs. Paul,** 31 U.S. 141; 8 L.Ed. 348; 6 Pet. 141, in maintaining the "principle of national supremacy," nor reasons of Congressional convenience in avoiding "unnecessary periodic pro forma" re-enactments of Assimilative crimes acts, nor the possible good motives of the policy of "conforming" with state laws in federal enclaves justify transgression of basic constitutional principles.

ARGUMENT

I.

As an exclusively legislative function of Congress, this attempted delegation of the power to create federal criminal law is unconstitutional.

We appreciate that there has been judicial recognition that other branches of the federal government, or the state governments, may properly share certain functions with Congress./1

1/ As reflected in certain of the statutes and cases cited by Appellant, discussed in this brief, pp. 8-18.

However, the decisions have imposed limitations on such shared participation.

Congress may not delegate powers which are strictly and exclusively legislative. **Wayman vs. Southard,** 23 U.S. 1, 42; 10 Wheaton 1, 42; 6 L.Ed., 253, 262.

This Court has emphatically invalidated Congressional attempts to surrender to another agency of the federal government inherently legislative functions. **(Panama Refining Co. vs. Ryan,** 293 U.S. 388, **U.S. vs. Schechter,** 295 U.S. 495).

Appropriately and consistently, attempts by state legislatures to confound our system of dual sovereignty by delegating their functions to agencies of the federal government have been judicially forbidden. **Hutchins vs. Mayo** (Fla. Sup. Ct.) 197 So. 495, 133 ALR 394.

The defining of federal crimes and the fixing of penalties therefor is clearly a power belonging exclusively to the legislative branch of the federal government. As stated by Justice Stone, in **Viereck vs. U.S.,** 318 U.S. 236: "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulations having legislative authority, and then only if punishment is authorized by Congress." — citing cases.

In the case at bar, the attempted delegation is not partial (therefore posing no such problem as whether or not the delegate was given sufficiently definite standards to apply) — but is entire and complete. In this case the state of Texas, not Congress, has created and defined the crime upon which this indictment is grounded; and the state of Texas, not Congress, has fixed the penalty for the federal crime thusly created and defined.

Clearly, therefore, the state of Texas would be exercising for federal enclaves within her borders an exclusively legislative function of the Congress, if constitutional warrant were to be accorded the purported prospective application of the 1948 Federal Assimilative Crimes Act.

II.

In its attempted prospective application, the Federal Assimilative Crimes Act of 1948 is an unconstitutional delegation of Congress' legislative functions.

This Court, it is true, has never directly held that federal assimilation to federal enclaves of future state criminal laws would be unconstitutional. (See Appellant's Br. p. 19, n. 12.) Conversely, neither this Court, nor any inferior federal court, has ever held or suggested that such prospective assimilation would be valid.

However, the judicial and legislative histories of the pre-1948 Federal Assimilative Crimes Acts reflect strongly the opinion of this Court, inferior federal courts, and of the Congress that the prospective assimilation to federal enclaves of state criminal laws would be an unconstitutional delegation of Congress' legislative authority.

U.S. vs. Paul, 31 U.S. 141; 8 L.Ed. 348, 6 Pet. 141, involved the possible application in federal criminal prosecution for acts committed in the federal enclave of West Point, of an 1829 New York criminal statute under the 1825 Federal Assimilative Crimes Act. Chief Justice Marshall, speaking for this Court, held the 1825 act to be "limited to the laws of the several states in force at the time of its enactment."

Now, the 1825 Act did not by its terms limit its application, but provided for the "same punishment as the laws

of the state * * * provide for the like offense when committed within * * * such state."/2

Accordingly, it appears appropriate to interpret Marshall's opinion as reflecting a **constitutional** limitation upon the Act.

The Government apparently accepts this natural interpretation of Marshall's opinion in its statements that he was motivated by "philosophical considerations" (App. Br. 6, 21) related to his concern for maintaining the "principle of national supremacy." (App.Br. 21-22).

Clearly, the federal circuit courts of the Southern District of New York (**U.S. vs. Barney**, Fed .Cas. 14524) and of Montana (**U.S. vs. Barnaby**, 51 F. 20), both of which cited **U.S. vs. Paul**, interpreted Marshall's limitation as constitutional in nature.

The Eighth Circuit in 1906 (**Hollister vs. U.S.**, 145 F. 773) held valid a 1903 Congressional Act conferring jurisdiction on the federal courts of South Dakota to try, inter alia, larceny offenses committed on Indian reservations within the state, adopting the punishment of South Dakota laws. In so doing, the Court, on p. 779, said: "It [the 1903 Act] does not purport to delegate to the state of South Dakota authority at any time in the future to fix, ad libitum, the punishment of federal offenses. This it could not do. Congress seems to have been willing to adopt the punishment as fixed in 1903 by the laws of South Dakota for the crime of larceny, and such adoption was, in our opinion, competent legislation," citing the **Paul**, **Barney** and **Barnaby** cases.

Just as clearly did Congress (prior to the 1948 Act) similarly interpret **U.S. vs. Paul**, as conceded by the Government (App.Br. 11-12) and as reflected by the Federal Assimi-

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2/ Section 3, 4 Stat. 115.

lative Crimes Acts of 1866, 1898, 1909, 1933, 1935, and 1940, all of which in express language limited their application to state criminal laws in force at the time of each such enactment, or as of a specified date prior to such enactment.

When Congress by its 1948 Federal Assimilative Crimes Act abandoned this interpretation, it apparently did so solely on the basis of convenience, to make "unnecessary periodic pro forma amendments of this section to keep abreast of changes of local laws," (Reviser's Note, 18 USC, following section 13).

Surely, there were in 1948 — nor since then — no federal judicial holdings which discarded the constitutional interpretation of **U.S. vs. Paul.**

Probably the latest expression by this Court, prior to 1948, dealing with the question of the prospective application of state laws to federal enclaves was in **Pacific Coast Dairy, Inc. vs. Dept. of Agriculture of Calif., et al,** 318 U.S. 285; rehearing denied 318 U.S. 801, decided in 1943, with Mr. Justice Roberts speaking for the majority (6-2). In this case this Court considered the question of the applicability of a California regulatory law to a milk distributor doing business with the War Department on the federal enclave of Moffett Field. This Court observed (on p. 294 of 318 U.S.) that "the state statute involved was adopted long after the transfer of sovereignty and was without force in the enclave."

Franklin vs. U.S., 216 U.S. 559, reflects the same concept. This Court then almost summarily rejected the contention that the Assimilative Crimes Act of July 7, 1898, which expressly limited its application to state laws then in force, was an unconstitutional delegation of Congress' legislative function. In so doing this Court most significantly remarked, after stating the limitation of state

laws to the date of the 1898 act: "There is, plainly, no delegation to the states of authority in any way to change the criminal law applicable to places over which the United States has jurisdiction."

This Court, in the **Franklin** case, obviously was recognizing the proposition that prospective application in federal enclaves of state criminal laws would be a delegation of Congress' legislative functions.

III.

Valid Congressional action in aid of enforcement of state law, in filling up the details of federal law, in removing obstacles to the operation of state law, or in delegating law-making functions to federal territories, etc. provide no sound constitutional justification for giving the states the authority to enact federal criminal law for federal enclaves.

A. Appellant urges that statutes similar to the Federal Assimilative Crimes Act of 1948, "reflecting Congressional adoption of state law for a particular federal purpose have been held constitutional." (App.Br. 26-30).

(1.) None of the statutes cited by Appellant in support of this proposition involve the adoption of state laws for federal enclaves. We believe this distinction to be real, because the power of Congress to legislate for federal enclaves has its own separate constitutional warrant, i.e. Article I, Section 8, Clause 17 of the Federal Constitution, which confers upon Congress "exclusive Legislation" over federal enclaves; and the judicial history of the interaction of federal and state powers with respect to such enclaves has been significantly different from the judicial history of federal-state power relations in the exercise of Congress' com-

merce power, power to enact bankruptcy laws, its war-making power, and the like./3

(2) We believe that, additionally, a single, overriding distinction eliminates authoritative significance from appellant's citations of federal statutes in "the field of criminal law", together with the cases cited thereunder. In all such statutes, where criminal sanctions have been imposed, the basic definition of the crime and the fixing of punishment therefor has been accomplished by Congress, not the states. In other words, the legislative function of defining crime and fixing the punishment therefor has been performed by Congress, not the states.

Indeed, **Clark Distilling Co. vs. Western Maryland Ry. Co.**, 242 U.S. 311, cited by appellant (App.Br. 27) most significantly illustrates the constitutional distinction we are here asserting, where on page 326 this Court, in rejecting the contention that the Webb-Kenyon Act of March 1, 1913, 27 USC 122 (37 Stat. 699), was an unconstitutional delegation of power to the states, said that "the will which causes the prohibition to be applicable is that of Congress * * *." The 10th Circuit, in **Hayes vs. U.S.**, 112 Fed. 2d 417, construing the operation of the Liquor Enforcement Act of 1936, 27 USC (1946 ed.) 223 (49 Stat. 1928-30), similarly rejected the contention that Congress was unconstitutionally imposing penalties for violating state laws, saying on page 422 that the penalties were for the violation of the Liquor Enforcement Act.

Obviously, in the case at bar, the trial and conviction of Appellee in a federal court for acts defined as

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3/ The judicial history of the application of state laws in federal enclaves is discussed in our brief, pp. 5-6, supra.

offenses by Sections 535(b) and 535(c) of the Texas State Penal Code, and the assessment of punishment under these Texas statutes, enacted two years after the Federal Assimilative Crimes Act of 1948, involve the operation of the will of the state of Texas, and not "the will of Congress." The legislative functions of defining crime and assessing the punishment therefor would clearly be exercised by the state of Texas and not by Congress.

(3) Aside from this general consideration, which we believe renders inapplicable to the case at bar appellant's citations of other federal statutes of a criminal nature, there are additional clear-cut bases for distinction.

This Court itself, in the **Clark** case, supra, emphasized the limited application of its decision. On page 331 of 242 U.S., in dealing with the suggestion that its decision would create the possibility of a dangerous extension of the interstate commerce power in allowing the Webb-Kenyon Act's application of state prohibitions, this Court said:

> "* * * The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

We consider significant the different judicial treatment given federal statutes in aid of the enforcement of state laws from that given acts assimilating state criminal laws.

The Fugitive from Justice Act, 18 USC 1073 (62 Stat. 755), clearly was in aid of enforcement of state laws.

Hemans vs. U.S., 163, F.2, 228 (C.A. 6) cert.den., 332 U.S. 801 (App.Br. 28).

The Connally Hot Oil Act, 15 USC 715 et seq. (49 Stat. 30) (App.Br. 29), similarly has been construed as a federal statute in aid of state laws. **Humble Oil Refining Co. vs. U.S.**, 198 F.2, 753 (C.A. 10), cert.den., 344 U.S. 909; **Griswold vs. the President of the U.S.**, 82 F.2, 922 (C.A. 5).

Although we cannot say that this Court, or others, have directly so held, we believe it logical to consider that, in large part at least, the Webb-Kenyon Act and the Reed Amendment thereto, the Liquor Enforcement Act of 1936, the Federal Black Bass Act, 16 USC 852, (61 Stat. 517 and 66 Stat. 736),/4 and the Johnson Act, 15 USC 1172 (64 Stat. 1134)/4 should likewise be considered federal statutes in aid of state laws.

This Court stated, on page 324 of 242 U.S., in the **Clark** case, supra, that the purpose of the Webb-Kenyon Act was

> "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws * * *" /5

4/ Appellant's Brief, p. 28.

5/ It might be appropriate to note **US vs. Constantine,** 296 US 287, which held a penalty provision of the Revenue Act of 1926, purportedly a tax on certain businesses operated contrary to state laws as being a penalty, and a penalty which could be sustained only through the 18th Amendment (then repealed), and therefore a penalty for violation of state laws beyond Congressional power to impose. We think it clear that the invalidity of this provision of the Revenue Act of 1926 rested upon the proposition that Congress could not impose a penalty for violation of state laws in a field where it had otherwise no constitutional authority to act. This situation differs from the cases construing the Webb-Kenyon Act, and other federal criminal statutes cited by appellant, in that Congress independently in such cases had the power to act with reference to the subject matters there covered, whether by virtue of the 18th Amendment or by virtue of the interstate commerce laws. This distinction was recognized by the Fifth Circuit in the **Griswold** case, supra, when on page 923 of 82 F. 2d, the Court remarked that the federal statute involved, though in aid of state purposes, dealt only with interstate commerce:

(4) Leaving the criminal field, appellant cites three federal civil statutes as representing constitutional adoption of state laws, viz.: the Federal Torts Claims Act, 28 USC 1346(b), (63 Stat. 62), the Bankruptcy Act's provisions respecting exemptions under state law, 11 USC 24 (30 Stat. 548) and federal provisions for removal of federal rent control through state action, 50 USC, App. 1894 (i) (1) and (2), (63 Stat. 25).

The purposes of the Federal Torts Claims Act were to waive (partially) the sovereign immunity of the United States from liability for its torts and, in so doing, to provide for the determination of such liability in accordance with the laws of the place where the alleged tortious act or omission occurred. **Stewart vs. U.S.,** 186 F.2, 627 (C.A. 7), cert.den., 341 U.S. 940 (App.Br. 29).

The federal courts necessarily became the trial forums for lawsuits sounding in tort against the United States, whose liability within the scope of the waiver of immunity of the Federal Torts Claims Act became that of a private person.

We simply fail to see that this Act constitutes an adoption into federal law of state laws, being rather the enforcement of state laws in federal courts, as would be the case in suits between private persons in diversity jurisdiction situations, under the decision of **Erie R. Co. vs. Thompkins,** 304 U.S. 64.

At most we believe that the Federal Torts Claims Act, as well as the Bankruptcy Act and the Housing and Rent Control Act of 1947, are included in the category of federal legislation the application of which — in part at least — is contingent upon certain conditions, such as the status of state law./6

6/ Logically we believe it could be said that this characteristic may attach also to the federal statutes of a criminal nature cited by Appellant.

Cooley's **Treatise on the Constitutional Limitations** (7th Ed.) is instructive in discussing how conditional legislation does not necessarily constitute an unconstitutional delegation of legislative power. On page 163 the author sets out the "settled maxim" that the lawmaking power of the legislature cannot be delegated. Following his discussion of this maxim, he states on pages 163 and 164:

> "But it is not always essential that a legislative act should be a completed statute which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event. * * *."

In rejecting the contention that the Bankruptcy Act's provisions allowing exemptions under state law constituted unconstitutional delegation of Congressional power, this Court has characterized these provisions as "**recognition** of local laws." (Emphasis supplied.) **Hanover Natl. Bank vs. Moyses,** 186 U.S. 181, 190. (App.Br. 29).

Logically we should treat, not as adoption of state laws, but as the use of state laws as conditions regulating the application of federal law, the 1947 Housing and Rent Control Act's provisions for removing federal rent control where state rent control laws were enacted, or where there was state determination that rent control was unnecessary. **United States vs. Shoreline Coop. Apts.,** 338 U. S. 897, a memorandum decision upholding the constitutionality of these provisions was based upon the holding in **Woods vs. Miller**, 333 U.S. 138. This earlier case held to be constitutional provisions for removal of federal rent controls upon findings of the housing

administrator. Accordingly, we believe it logical to consider that this Court in the **Shoreline** case treating the existence of state rent control laws, or state determinations of lack of necessity for rent controls, as being similar to the existence of conditions found by the housing administrator to warrant removal of federal rent controls.

We believe it reasonable to say that the federal statutes cited by Appellant, in any prospective application they might have, would not be adopting state laws as federal laws, but simply conditioning the application, force and effect of the federal laws upon the state laws.

This clearly is not the case with the attempted prospective effect of the Federal Assimilative Crimes Act of 1948. It does not condition its application upon state laws — there is nothing to apply, except the state laws themselves. The 1948 Act attempts to adopt prospectively the state criminal laws for federal enclaves — a concept significantly different in a constitutional sense.

(5) This significantly different constitutional concept gives rise to a final basis for distinguishing the statutes and cases cited by Appellant as reflecting instances of constitutional adoption by Congress of state laws.

In only one of the cases cited by Appellant was the possible prospective feature of the appropriate statute directly in issue. **Clark Distilling Co. vs. Western Md. Ry. Co.**, 242 U.S. 311, may reasonably be presented as an exception, albeit distinguishable on other grounds (q.v., our discussion, this brief, pp. 9-10, supra).

Justice Holmes, in his dissent in **Knickerbocker Ice Co. vs. Stewart,** 253 U.S. 149, 169, did say, "I thought that

Clark Distilling Co. vs. Western Maryland Ry. Co. * * * went pretty far in justifying the adoption of state legislation in advance." Continuing, however, he said,

> "But I can see no constitutional objection to such an adoption in this case * * * **I assume that Congress could not delegate to state legislatures the simple power to decide what the laws of the United States should be in that district.** But when institutions are established for ends within the power of the states and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists." (cf. App. Br., 27). (Emphasis supplied).

Knickerbocker's majority opinion raises serious doubt, to say the least, that Mr. Justice Holmes' interpretation of the **Clark** case in this regard represents the established view of this Court.

This Court in **Knickerbocker** held invalid a Congressional attempt to adopt state workmen compensation laws covering maritime workers, using strong language in disapproval of delegation of Congress' legislative power to the states:

> "The subject [admiralty and maritime jurisdiction, for which read 'exclusive Legislation' over federal enclaves] was entrusted to it [Congress] to be dealt with according to its discretion — not for delegation to others. * * * Congress cannot transfer its legislative power to the states — by nature this is non-delegable. * * *" (p. 164 of 253 US).

We have already discussed **Pacific Coast Dairy, Inc. vs. Dept. of Agriculture of Calif., et al**, 318 U.S. 285, rehearing denied, 318 U.S. 801. (This brief, page 7). This

Court's holding in that case can fairly be said, we believe, to have considerable advantage over the **Clark** case as authority in the case at bar because: 1) it dealt specifically with the question of "prospective"/7 operation of state law; 2) it involved the "prospective"/7 application of state law to a federal enclave; 3) it is of course a much later expression of this Court.

B. Appellant proposes that Congress should be permitted to delegate the power to the states to enact criminal legislation for federal enclaves, because Congress may delegate such powers to territorial legislatures and the legislative assembly of the District of Columbia, and presumably to legislatures created for such enclaves. (App.Br. 33-34).

Appellant's proposition simply ignores the dual sovereignty concept of our constitutional system.

Our Federal Constitution divides power between the Federal government and the states. No such constitutional division of powers exists between the Federal government and the territories, District of Columbia and federal enclaves. The Constitution confers no powers upon them; necessarily federal power exercised therein must be conferred by the Congress.

We analyze Appellant's effort to escape the clear implications of our dual sovereignty concept as embracing two principal theories.

7/ We place "prospective" in quotes because we consider this to be a logical interpretation of this Court's holding. This Court, in the **Pacific** case, supra, recognized the applicability to federal enclaves of local law in existence at the time of cession of the enclave, but denied the applicability of state laws enacted subsequent to cession.

> The first of these postulates the impracticability of delegating legislative authority to some body within each federal enclave, and urges that the presumed necessity of delegation suggests the legislature of the surrounding state as the body most practically suited to exercise the power (App.Br. 34). The role of convenience or practicality is not in our understanding a determinative basis for interpreting our Federal Constitution./8

Secondly, Appellant tells us that the 1948 Federal Assimilative Crimes Act does not give any "* * * special power * * * to the state legislature to decide what shall be the law for a federal enclave," merely providing that changes in state law shall "apply in the federal area as well." (App.Br. 34). Indeed, Appellant recognizes that Mr. Justice Holmes, despite his feeling that **Clark Distilling Co. vs. Western Md. Ry. Co.**, 242 U.S. 311, had gone "pretty far in justifying the adoption of state legislation in advance," assumed "that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district." **Knickerbocker Ice Co. vs. Stewart**, 253 U.S. 149, 169.

We consider that Appellant is saying in effect: the state of Texas cannot enact criminal laws that apply only to federal enclaves, but Texas criminal laws of general application enacted subsequent to the 1948 Federal Assimilative Crimes Act constitutionally are enforceable in the federal courts as a matter of conformity.

We simply inquire, what is the constitutional difference? Appellant's distinction could become a constitutional dif-

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8/ The practicality problem is further discussed in this brief, Part IV, page 19, et seq., infra.

ference only if federal courts constitutionally could try violations of state criminal laws as such. This proposition of course is constitutionally untenable.

In the case at bar, the United States is party plaintiff, is prosecutor, just as much as in cases of violation of criminal laws Congress has specifically denounced.

The power to convict and punish being here asserted would, if constitutionally allowable, be federal power. Only the federal legislature can constitutionally exercise it.

Finally, is the "conformity" sought by Appellant in the prospective features of the 1948 Federal Assimilative Crimes Act the "conformity" permitted in such cases as **James vs. Dravo Contracting Co.**, 302 U. S. 134, 141-149; **Stewart & Co. vs. Sadrakula,** 309 U.S. 94; **Mason Co. vs. Tax Commission,** 302 U.S. 186? (App.Br., p. 33) Clearly not. **James vs. Dravo** held that cession to the United States need not require complete cession of state jurisdiction (pp. 141-142 of 302 U.S.). No such question here exists. The **Mason County** case determined that the United States had not acquired "exclusive jurisdiction" over the land involved (pp. 203-210 of 302 U.S.), likewise a question not existing in the case at bar. In **Stewart vs. Sadrakula,** while this Court recognized that local laws respecting private rights in existence at the time of cession of a federal enclave continue in force, in the absence of conflicting Congressional action (pp. 99-100 of 309 U.S.), this Court stated that statutes enacted after cession "are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current." (p. 100 of 309 U.S.). And **Pacific Coast Dairy, Inc. vs. Dept. of Agriculture of Calif., et al.,** 318 U. S. 285 (discussed in this brief, pp. 7, 15-16, supra) has directly and recently confirmed this limitation on the operation of state laws enacted subsequent to cession.

IV.

Neither possible outmoding of Chief Justice Marshall's alleged "philosophical considerations" in support of his assumed motivation in U.S. vs. Paul, 31 U.S. 141; 8 L.Ed. 348; 6 Pet. 141, in maintaining the "principle of national supremacy," nor reasons of Congressional convenience in avoiding "unnecessary periodic pro forma" re-enactment of assimilative crimes acts, nor the possible good motives of the policy of "conforming" with state laws in federal enclaves, justify transgression of basic constitutional principles.

Appellant depreciates the value of Chief Justice Marshall's opinion in **U.S. vs. Paul,** supra, on the basis of his "philosophical considerations" in support of the "principle of national supremacy," because, as Appellant puts it, with "the power of the federal government * * * [being] * * * firmly established," "Marshall's 'exclusive' idea no longer prevails." (App.Br. 21-22).

Appellant cited Corwin, **The Constitution of the United States of America, Analysis, Interpretation with Annotations (1953),** page xxvi Sen. Doc. No. 170, 82d Cong., 2d Sess. On page xxviii of his "Introduction" Corwin appears to disagree with Appellant's conclusion that the "principle of national supremacy" no longer supplies valid energy to constitutional interpretations, saying:

> "The purpose of it [the Supreme Court] serves more and more exclusively the purpose for which it was originally created to serve, the maintenance of the principle of National Supremacy."

We are not aware that this Court has ever overturned a prior decision on this basis.

Appellant's position in this respect actually seems related to Appellant's overall contention, in default of directly sup-

porting authority, that Congress' attempt at prospective adoption for federal enclaves of state criminal laws should be validated on the basis of convenience.

This "convenience" basis finds its earlier expression in the very publication of the 1948 Federal Assimilative Crimes Act in United States Code Annotated, following Section 13, Title 18, in the Reviser's Note, stating that the prospective features of the Act had the purpose of avoiding "unnecessary periodic pro-forma re-enactments" of assimilative crimes acts.

There appears to be no expression of this justification other than those found in Appellant's brief and in 70 H.L.R., beginning at p. 685. The Note in the February 1957 issue of the Harvard Law Review seems not to be occasioned by any recent case, and indeed in our view contains little not expressed in Appellant's brief. The Note, as quoted in Appellant's brief (p. 35, n.22) does suggest that the "danger that arbitrary or irresponsible laws may result from a delegation to the states" is lessened by the "federal government's discretion not to prosecute. * * *" 70 HLR 685, 690.

We speculate that the note's author is here referring to the U.S. Attorney's practical discretion not to submit a possible criminal offense to a Federal Grand Jury, to his influence in persuading a Grand Jury not to indict, to his discretion in not filing an information, or in filing a motion to dismiss an indictment.

We hope it may not be considered facetious to remark that it does seem appropriate, although not legally persuasive, to justify in part the attempted giving to the states of complete discretion in creating criminal laws for federal enclaves by the assumed balance of the prosecutor's discretion in not enforcing these assertedly valid enactments.

In the first and last analysis we believe it fair to say that Appellant's case rests upon the proposition that the policy of conformity is well motivated and convenient.

Possibly so.

However, this Court has frequently, and fairly recently, held that neither good motives nor convenience represented any acceptable substitute for constitutionality.

In **Youngstown Sheet & Tube Co. vs. Sawyer,** 343 U.S. 579, the Government invoked the existence of a "grave emergency" as justifying the President's order for seizure of steel mills under the President's alleged constitutional powers as Chief Executive and as Commander-in-Chief of the Armed Forces (p. 582 of 343 U.S.). Mr. Justice Black, in delivering the opinion of this Court, denying the presidential power asserted, did not dispute the Government's claim of "grave emergency," but said (on page 589 of 343 U.S.): "The founders of this nation entrusted the law making power to the Congress alone in both good and bad times."

Mr. Justice Jackson, concurring, remarked on the hazard of "confusing the issue of a power's validity with the cause it is invoked to promote * * * The tendency is strong to emphasize transient results upon policies — such as wages or stabilization — and lose sight of enduring consequences upon the balanced power structure of our Republic." (p. 634 of 343 U.S.).

Mr. Justice Clark denied the President's power to act in the emergency because Congress had prescribed the methods for meeting the emergency. (p. 662 of 343 U.S.).

Mr. Justice Douglas began his concurring opinion:

"There can be no doubt that the emergency which

> caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act." (p. 620 of 343 U.S.)

After bespeaking recognition of the greater efficiency and practicality with which the Executive can act, Justice Douglas stated:

> "We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution," (p. 630 of 343 U.S.), and "We pay a price for our system of checks and balances * * *" (p. 633 of 343 U.S.).

This last statement of Justice Douglas received emphasis from Mr. Justice Frankfurter in his concurring opinion:

> "Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded — too easy." (p. 593 of 343 U.S.).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

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